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# RHB Bank Bhd v Ujang bin Che Daud

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–3968 OF 1998
NALLINI PATHMANATHAN JC
10 JUNE 2009

*Banking — Banks and banking business — Share financing facility — Share financing agreement executed by borrower — Drawdown forms signed by borrower — Trading profits received — No evidence to show borrower had participated or acquiesced to trades undertaken by bank's employees — Whether sufficient to show that borrower undertook liability for purchase and sale of shares by plaintiff's employees*

*Civil Procedure — Action — Cause of action — Action to recover moneys owing under a share financing facility — Share financing agreement executed by borrower — Trading profits received — No evidence to show borrower had participated or acquiesced to trades undertaken by bank's employees — Whether sufficient to show that borrower undertook liability for purchase and sale of shares by plaintiff's employees — Whether plaintiff proved its action on balance of probabilities*

*Contract — Sale and purchase of shares — Share trading — Share financing facility — Share financing agreement executed by borrower — Drawdown forms signed by borrower — Trading profits received — No evidence to show borrower had participated or acquiesced to trades undertaken by bank's employees — Whether sufficient to show that borrower undertook liability for purchase and sale of shares by plaintiff's employees*

The plaintiff sued the defendant to recover moneys owing under a share financing facility granted to the defendant. The plaintiff claimed that it had offered the defendant a line of credit for the purchase of shares. The defendant accepted the plaintiff's letter of offer and duly executed the share financing facility agreement. At the plaintiff's request, the defendant pre-signed blank drawdown notices. Trades were subsequently conducted and the defendant's share financing facility was utilised for the purchase of large blocs of varied shares, between October 1993 and February 1994. The pre-signed drawdown notices were filled in to enable the use of the facility. The plaintiff maintained that the defendant made telephone calls to its representatives, who then passed on orders to dealers' representatives in

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several different broking firms, who in turn executed the trades. There were however no contract-notes to corroborate these trades. Neither were any statements produced by the plaintiff to exhibit these trades. The plaintiff had issued four cheques in the defendant's name, being trading profits arising from the purchase and sale of shares. These cheques, said the plaintiff were encashed. The facts also showed that just after executing the share financing facility, the defendant obtained from the plaintiff another facility for Elegant Win Sdn Bhd ('the Elegant Win facility'). The defendant contended that he did not utilise the share financing facility, nor place any orders for the purchase and sale of shares. He further denied having authorised any employee of the plaintiff to use his share financing facility to trade in shares on his behalf. He maintained that his share financing facility was manipulated or abused and denied liability for the debt which had accrued in his account. The defendant also claimed that when he signed the blank drawdown notices, he assumed that they were for the Elegant Win facility rather than the share financing facility.

**Held**, dismissing the plaintiff's case:

(1) It was clear to the court that the defendant did sign the share financing facility agreement. He was therefore bound by it. The defendant was neither illiterate nor did he plead non est factum. He was bound by the terms of the share financing facility agreement and could not plead ignorance or negligence in executing the same. The fact that he might have been confused as to whether the agreement was for the Elegant Win facility or for himself did not in any manner alter his obligations under the agreement. There was also no evidence for the court to conclude that the defendant had signed the share financing facility believing it to be the Elegant Win facility (see paras 29 & 31). *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 (referred); *Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society* [1970] 3 All ER 961 (referred).

(2) There was no direct evidence to show that the defendant had signed the drawdown notices to authorise an employee of the plaintiff — PW5 — to trade on his behalf using his facility. It appeared to the High Court that the defendant was stating the truth when he maintained that he had not placed any orders for the purchase and sale of shares. It was not apparent at whose request, the shares were purchased and sold (see paras 33, 34 & 35).

(3) In the instant case, while there was evidence to show that the defendant had entered into the share financing facility agreement, signed the blank drawdown notices and received some profits arising from trading profits, the evidence was insufficient to conclude that the defendant

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undertook the entire liability for the purchase and sale of shares undertaken by the plaintiff's employees. It was the singular absence of any concrete evidence to show that the defendant participated or acquiesced fully to the trades that were undertaken by the plaintiff's employees that threw doubt on his liability for the losses incurred (see para 53).

(4) The encashment of the cheques did not of itself warrant the conclusion that the defendant was cognisant of the trades because it was in fact the plaintiff's officers and employees who had full conduct of the share financing facility through use of the pre-signed drawdown notices (see para 54).

(5) The High Court was not able to conclude that the plaintiff had proved its case on a balance of probabilities. Although the defendant had not proved fraud, the entirety of the evidence showed that there were serious irregularities in the conduct of the share financing facility which in turn threw doubt on whether the defendant was in fact liable for the trades executed utilising his account (see para 55).

**[Bahasa Malaysia summary**

Plaintif telah menyaman defendan untuk mendapatkan semula wang yang terhutang di bawah kemudahan kewangan saham yang diberikan kepada defendan. Plaintif telah mendakwa bahawa dia telah menawarkan kepada defendan kemudahan kredit untuk belian saham. Defendan telah menerima surat tawaran plaintif dan menyempurnakan perjanjian kemudahan kewangan saham seperti sepatutnya. Atas permintaan plaintif, defendan telah terlebih dahulu menandatangani notis-notis pengeluaran yang kosong. Selepas itu dagangan telah dijalankan dan kemudahan kewangan saham telah digunakan untuk belian blok besar pelbagai saham, antara bulan-bulan Oktober 1993 dan Februari 1994. Notis-notis pengeluaran yang telah ditandatangani terlebih dahulu telah diisi bagi membolehkan menggunakan kemudahan itu. Plaintif menegaskan bahawa defendan telah membuat panggilan telefon kepada wakil-wakilnya, yang kemudian telah menyampaikan pesanan-pesanan kepada wakil-wakil peniaga di beberapa firma broker yang berbeza, yang kemudiannya melaksanakan dagangan. Walau bagaimanapun tiada nota-nota kontrak untuk menyokong dagangan tersebut. Bahkan tiada apa-apa kenyataan yang dikemukakan oleh plaintif untuk menunjukkan dagangan tersebut. Plaintif telah mengeluarkan empat keping cek atas nama defendan, yang mana keuntungan dagangan wujud daripada belian dan jualan saham. Cek-cek tersebut, boleh ditukarkan dengan wang tunai. Fakta juga menunjukkan bahawa sejurus selepas penyempurnaan kemudahan kewangan saham itu, defendan telah mendapat daripada plaintif satu lagi kemudahan untuk Elegant Win Sdn Bhd

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('kemudahan Elegant Win'). Defendan menegaskan bahawa dia tidak menggunakan kemudahan kewangan saham itu, mahupun meletakkan apa-apa pesanan untuk belian dan jualan saham. Dia selanjutnya menafikan memberi kuasa kepada mana-mana daripada pekerja plaintif untuk menggunakan kemudahan kewangan sahamnya untuk berdagang dalam saham bagi pihaknya. Dia menegaskan bahawa kemudahan kewangan sahamnya telah dimanipulasikan atau disalahgunakan dan menafikan liabiliti untuk hutang yang terakru dalam akaunnya. Defendan juga mendakwa bahawa apabila dia menandatangani notis-notis pengeluaran yang kosong tersebut, dia menganggap ianya untuk kemudahan Elegant Win dan bukan kemudahan kewangan saham.

**Diputuskan**, menolak kes plaintif:

(1) Adalah jelas kepada mahkamah bahawa defendan telah menandatangani perjanjian kemudahan saham itu. Oleh itu dia terikat dengannya. Defendan bukan seorang yang tidak tahu membaca mahupun telah memplid non est factum. Dia terikat oleh terma-terma perjanjian kemudahan kewangan saham itu dan tidak boleh memplid kejahilan atau kecuaian dalam melaksanakan yang sama. Hakikat bahawa dia mungkin terkeliru dengan sama ada perjanjian itu adalah untuk kemudahan Elegant Win atau untuk dirinya tidak dalam apa cara mengubah tanggungjawabnya di bawah perjanjian itu. Tiada juga keterangan bagi mahkamah membuat kesimpulan bahawa defendan telah menandatangani kemudahan kewangan saham itu dengan mempercayai ianya kemudahan Elegant Win (lihat perenggan 29 & 31); *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640 dan *Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society* [1970] 3 All ER 961 dirujuk.

(2) Tiada keterangan langsung untuk menunjukkan bahawa defendan telah menandatangani notis-notis pengeluaran tersebut untuk memberi kuasa kepada pekerja plaintif — PW5 — untuk berdagang di pihaknya dengan menggunakan kemudahannya. Mahkamah Tinggi melihat bahawa defendan menyatakan yang benar apabila dia menegaskan bahawa dia tidak meletakkan apa-apa pesanan untuk belian dan jualan saham-saham. Ia tidak jelas atas permintaan siapa, saham-saham tersebut dibeli dan dijual (lihat perenggan 33, 34 & 35).

(3) Dalam kes semasa, di mana terdapat keterangan untuk menunjukkan bahawa defendan telah memasuki perjanjian kewangan saham, telah menandatangani notis-notis pengeluaran yang kosong dan menerima sedikit keuntungan daripada keuntungan dagangan lain, keterangan itu tidak mencukupi untuk membuat kesimpulan bahawa defendan mengambil keseluruhan liabiliti untuk belian dan jualan saham-saham

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yang diambil oleh pekerja-pekerja plaintif. Dengan ketiadaan sebarang keterangan kukuh untuk menunjukkan bahawa defendan terlibat atau bersetuju sepenuhnya dengan dagangan-dagangan tersebut yang dipikulkan oleh pekerja-pekerja plaintif yang telah menimbulkan keraguan tentang liabilitinya untuk kerugian yang ditanggung (lihat perenggan 53).

(4) Cek-cek yang boleh ditunaikan tidak dengan sendirinya mewajarkan kesimpulan bahawa defendan mengetahui tentang dagangan-dagangan itu kerana sebenarnya pegawai-pegawai dan pekerja-pekerja plaintif yang mengendalikan sepenuhnya kemudahan kewangan saham itu melalui notis-notis pengeluaran yang terlebih dahulu telah ditandatangani (lihat perenggan 54).

(5) Mahkamah Tinggi tidak dapat membuat kesimpulan bahawa plaintif telah membuktikan kesnya atas imbangan kebarangkalian. Meskipun defendan tidak membuktikan fraud, keseluruhan keterangan menunjukkan bahawa terdapat salah arah serius dalam pengendalian kemudahan kewangan saham itu yang sebaliknya telah menimbulkan keraguan tentang sama ada defendan sememangnya bertanggungjawab untuk dagangan-dagangan yang disempurnakan dengan menggunakan akaunnya (lihat perenggan 55).]

**Notes**

For cases on banks and banking business, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 43–58.

For cases on share trading, paras 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5017–5018.

**Cases referred to**

*Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640, HC (refd)

*Saunders (executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society* [1970] 3 All ER 961, HL (refd)

**Legislation referred to**

Bills of Exchange Act 1949 s 81A

Securities Industries Act 1983

*K Sivabalan (Sharizat Rashid & Lee) for the plaintiff.*

*LA Gomez (LA Gomez Meor Shaazizi & Associates) for the defendant.*

**Nallini Pathmanathan JC:**

INTRODUCTION

**[1]** In this action, the plaintiff, RHB Bank Bhd ('the plaintiff') makes claim

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against the defendant, Ujang bin Che Daud ('Ujang') in the sum of RM1,630,484.62 together with interest ('the debt'), being monies owing under a share financing facility afforded by it to Ujang in or around 11 October 1993. Ujang however maintains that he did not at any time utilise the said facility for the purchase and sale of shares, nor place any orders for the purchase and sale of shares. He further denies having authorised any employee of the plaintiff to use his share financing facility to trade in shares on his behalf. In short he maintains that his share financing facility was manipulated or abused. Accordingly he denies liability for the debt which has accrued due in his account. The issues that arise for consideration in this case therefore are as follows:

(i) Did Ujang utilise the share financing facility in the sum of RM1m afforded by plaintiff to him to trade in shares?

(ii) Did Ujang authorise any of the employees of the bank to use his share financing facility to trade in shares on his behalf?

**[2]** If the answer to either of these questions is in the affirmative, it would follow that Ujang is liable for the debt. If Ujang neither utilised the share financing facility himself, nor authorised any other employee of the bank to do so on his behalf, then he is not liable for the debt which has accrued in his account. The issue of whether Ujang authorised any one to trade in shares on his behalf utilising his facility is to be ascertained by a consideration of Ujang's conduct in relation to the share financing account. While he maintains strenuously that he has no knowledge of the transactions that were executed, and that a fraud has been perpetrated against him, it is his conduct in relation to the execution of the agreement, the execution of blank drawdown notices, the issue of receipt of trading profits that are relevant in ascertaining whether he expressly or impliedly acquiesced to the utilisation of the facility in his name for the purchase and sale of shares.

SALIENT FACTS OF THE CASE

**[3]** In the course of this trial which commenced in May 2004, the plaintiff called upon five witnesses to testify while the defendant called two witnesses. The plaintiff's witnesses were as follows:

- PW1 — Abdul Kamal Zainal Abidin;
- PW2 — Norasidi bin Salim;
- PW3 — Shamsino Abu Hashim;
- PW4 — Nur Russidah bt Mohamed; and
- PW5 — Ruzaini Abdul Razak.

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The defendant's witnesses were:

- DW1 — Ujang bin Che Daud, the defendant;
- DW2 — Zaid bin Ag Seman.

**[4]** The cumulative effect of their evidence may be summarised thus:

In October 1993 the plaintiff made an offer to Ujang for a line of credit for the purchase of shares in the sum of RM1,000,000 vide a letter of offer dated 5 October 1993. Ujang accepted the letter of offer on 11 October 1993 and entered into a formal agreement ('the share financing facility') on 14 October 1993. Ujang was requested to, and did pre-sign blank drawdown notices. Trades were conducted and Ujang's share financing facility was utilised for the purchase of large blocs of varied shares, between October 1993 and February 1994. The pre-signed drawdown notices were filled in to enable the use of the facility.

**[5]** The mode by which these share trades were conducted is in issue. While the plaintiff maintains that Ujang made telephone calls to its representatives, who then passed on these orders to dealers' representatives in several different broking firms, who in turn executed these trades, Ujang categorically denies having given any such instructions to any of the plaintiff's employees. There are no contract notes to corroborate these trades. Nor were any statements produced by the plaintiff to exhibit these trades.

**[6]** However the plaintiff did issue a total of four cheques in the name of Ujang bin Che Daud, being trading profits arising from the purchase and sale of shares, which were encashed. The issue of whether Ujang received these proceeds is also in dispute, as Ujang denies having taken any part of these trading profits.

**[7]** Soon after the share financing facility had been offered and accepted by Ujang, he also procured a facility for a company in which he was a director and shareholder, one Elegant Win Sdn Bhd in the sum of approximately RM2,500,000. This is relevant because Ujang maintains that this agreement was executed at the same time or around the same time as the share financing facility. Accordingly he maintains that when he signed the drawdown notices in blank he assumed that they were for the Elegant Win facility rather than the share financing facility. This again is relevant as it goes to the issue of the extent of his acquiescence to the use of his share financing facility.

**[8]** The evidence of the individual witnesses is now considered.

EVIDENCE OF PW1, ABD KAMAL ZAINAL ABIDIN ('PW1')

**[9]** PW1 explained how the debt in this case became vested in RHB Bank

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Bhd. The original lender was Rakyat Merchant Bankers Bhd. Pursuant to a vesting order dated 22 July 1995 the assets and liabilities of Rakyat Merchant Bankers Bhd was vested in BSN Merchant Bank Bhd. On 7 November 1996 these same assets and liabilities were vested in DCB Bank Bhd. On 1 July 1997 DCB Bank Bhd changed its name to RHB Bank Bhd. The various vesting orders and notice of change of name were duly produced, explaining how the plaintiff could bring this action against Ujang. This is not in dispute.

**[10]** PW1 gave evidence based purely on the documents available in the bank's records. He had no personal knowledge of the circumstances giving rise to the grant of the share financing facility nor its utilisation. The salient terms of the share financing facility were outlined. Based on the documents in the bank's records PW1 referred to several drawdown notices to conclude that the defendant had made requests for drawdowns from the said facility between October 1993 and February 1994. He further explained that Ujang was accorded several payments being trading profits. Having referred to the documents evidencing these drawdowns as well as the receipt of trading profits, PW1 concluded his evidence in chief by explaining that the debt remains outstanding.

**[11]** In the course of cross-examination, PW1 conceded that he has no personal knowledge that the drawdowns were made or that Ujang made the requisite drawdowns. He also confirmed that the cheques comprising the trading profits were received on behalf of Ujang by one Ismail Ahmad, a friend of Ujang's. He further confirmed that there was no authorisation from Ujang to allow Ismail Ahmad to collect the cheque on his behalf. As such he could not confirm that Ujang had received the cheque. But given that the trading profits were issued vide 'crossed' cheques, and were subsequently encashed, he concluded that Ujang had indeed received these proceeds.

EVIDENCE OF PW2, NORASIDI BIN SALIM

**[12]** Norasidi bin Salim, PW2 ('PW2') was the chief executive officer/managing director of Rakyat Merchant Bankers Bhd between 1992 and 1994. He confirmed that he knew Ujang as a college student when they were together at Institut Teknologi Mara. He testified that Ujang approached him for a facility with the bank in respect of a quasi-governmental project with Mara. PW2 denied using Ujang's facility for himself as claimed and maintained that he had not benefited in any manner from the use of Ujang's share financing account.

**[13]** In the course of cross-examination, PW2 stated that he could not recall whether the loan facility afforded to Ujang was in his name or that of Elegant Win Sdn Bhd, a company where Ujang is the main shareholder and

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director and the vehicle for his business. It was put to PW2 that Ujang's share financing facility was utilised by officers of Bank Rakyat without his knowledge or control. PW2 maintained that he had no knowledge of any such utilisation. He denied using Ujang's account for his own purposes or for the purchase of Khong Guan shares in Singapore.

EVIDENCE OF PW5, RUZAINI ABD RAZAK

*The share financing facility*

**[14]** PW5, Ruzaini Abd Razak ('PW5') gave evidence that at the material time he was a manager in the Investment Services Department of Bank Rakyat. He enjoyed a normal banker-customer relationship with Ujang. He explained how the share financing facility was approved for Ujang and how Ujang was instructed by the Bank to attend at the solicitors' offices to execute the relevant agreements. The legal and other costs accruing due were deducted through the share financing facility. From his evidence and that of PW1, it emerged that on 11 October 1993 Ujang signed a letter of offer for the share financing facility in the sum of RM1m. The salient terms of the facility were set out there. Three days later, on 14 October 1993, Ujang executed a share financing facility agreement.

*The utilisation of the share financing facility via pre-signed drawdown notices*

**[15]** He also executed several drawdown notices in blank. The share financing facility was utilised on the same day, ie 14 October 1993 for the purchase of 50 lots of Kretam Holdings shares through the broking firm of Ke-Zan Securities in Singapore. Thereafter between 14 October 1993 and 22 February 1994 the facility was utilised for the purchase and sale of a variety of shares which in turn were purchased through several different broking houses. The pattern of utilisation of the facility is as follows, bearing in mind that the drawdown notices had been pre-signed by Ujang:

(i) on 2 November 1993 a sum of RM122,269.19 was drawndown for the purchase of 33,000 shares of KLIH shares through BBMB Securities Sdn Bhd;

(ii) on 4 November 1993, a sum of RM108,177 was drawndown for the purchase of Time Engineering shares through Ke-Zan Securities in Singapore;

(iii) on 11 January 1994 a sum of RM180,805.88 was drawndown for the purchase of 25,000 shares of Kemayan Holdings through Seagroatt & Campbell;

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(iv) on 15 February 1994 a sum of RM56,441.90 was drawndown ofr the purchase of 20,000 ADMB shares through Capitalcorp Securities Sdn Bhd;

(v) on 22 February 1994, a sum of RM739,459.50 was drawndown for the purchase of 100,000 shares of Kemayan through Capitalcorp Securities Sdn Bhd.

**[16]** It is an agreed fact that no account in the name of Ujang was opened in any of the broking houses named above.

*Conduct of trades*

**[17]** How then were these trades conducted? PW5 in examination in chief gave evidence that Ujang gave instructions directly to him via phone calls to buy or sell certain shares. PW5 testified that he then executed the order as soon as he could. This was possible as the drawdown notices had bee pre-signed by Ujang.

*Trading profits*

**[18]** PW5 then went on to explain that Ujang had benefited directly from the share trades in that trading profits were made available to him in the sums of

(a) RM15,000 in November 1993;

(b) RM36,737.34 in December 1993;

(c) RM13,130.59 in December 1993; and

(d) RM14,197.46 in February 1994

CROSS-EXAMINATION OF PW5

*Conduct of trades*

**[19]** In the course of cross-examination however, PW5 testified that some of the share trading transactions were conducted by him, and some by his supervisor, whom he did not identify. He confirmed that he was not licensed to buy and sell shares under the Securities Industries Act 1983 but that he gave instructions to a dealer's representative to buy shares on behalf of Ujang. When it was put to him that Ujang did not at any time give any instructions to any dealer's representative to buy or sell shares, PW5's response was that he could not remember. He admitted that he was unable to produce any evidence to substantiate the fact that he obtained instructions from Ujang to trade in shares.

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**[20]** It was further put to him, that in order to utilise the share financing facility, Ujang needed to have an authorised account with a broking firm with a designated dealer's representative and for all trades to be particularised. PW5 again admitted that none of these procedures had been undertaken. He could not recall whether a trading account had been opened for Ujang or whether a trust account had been opened for Ujang. The significance of this is that even if the trading account had been opened in Bank Rakyat's name, the designation that particular shares had been held for the account of Ujang would have been necessary to protect Ujang's interests. However there was no evidence produced that this was indeed done.

*Cheques in favour of Ujang*

**[21]** With regards to the letters issued in the name of Ujang together with cheques made out in his favour, PW5 confirmed that he was the one who had prepared the letters and cheques. He could not recall who had received the cheques, but stated that based on the records, it was one 'Shamsudin' who received the cheques. With respect to all the four cheques PW5 confirmed that someone other than Ujang had received the cheques.

*Conclusions from PW5's evidence*

**[22]** With respect to the conduct of trades, a perusal of the totality of PW5's evidence suggests that it is less than clear that Ujang did indeed place orders by phone for the purchase of these large blocs of shares between October 1993 and February 1994. Significantly there are no contract notes produced or statements issued by the plaintiff setting out the details of these trades. Usually the production of such contract notes and statements provides corroboration of the fact that these trades were in fact instructed orally, thereby precluding the purchaser from denying these trades. In the instant case, in the absence of such documentation and in the light of PW5's somewhat vague evidence as to the mode of conduct of these trades, it is not apparent on a balance of probabilities that Ujang did in fact instruct the execution of these share purchases and sales between October 1993 and February 1994.

**[23]** It in fact brought to the fore the fact that as the drawdown notices were pre-signed, and no accounts were in fact opened in Ujang's name, trades had been undertaken using his facility to buy and sell shares at the behest of PW5 or his supervisor.

**[24]** The evidence of PW3 related to an explanation of how the amount outstanding under the share financing facility was arrived at. His evidence was based entirely on the records of the plaintiff.

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**[25]** The evidence of the other witness for the plaintiff, Nor Russidah bt Mohamed, PW4 ('PW4') was to explain that the bank no longer kept copies of the cheques made out in favour of Ujang as these records were more than seven years old. Accordingly the plaintiff could not produce copies of these cheques in court.

**[26]** The plaintiff closed its case having called five witnesses.

THE EVIDENCE OF THE DEFENDANT, UJANG

**[27]** Ujang testified that the only facility that he was aware of that he had utilised was that in the sum of approximately RM2.5m which he had taken from Bank Rakyat under the name of the company Elegant Win Sdn Bhd where he is a shareholder and director. That loan had been fully paid up. With respect to the share financing facility, he maintained that he could not recall asking for the same nor signing any documentation in relation to it. He could only recall signing documentation for Elegant Win Sdn Bhd in his capacity as director.

**[28]** When the specific loan documentation was put to him however, Ujang conceded that it was his signature on those documents. Ujang sought to give the impression that the two agreements, namely the facility for Elegant Win Sdn Bhd and the share financing facility had been procured at about the same time and that there was therefore some confusion as to the execution of these agreements.

**[29]** Notwithstanding his evidence it is evident to this court that Ujang did indeed sign the share financing facility agreement which comprises the subject matter of this action and is therefore bound by it. Ujang is neither illiterate, nor has he pleaded non est factum. Having executed both the letter of offer as well as the share financing facility agreement, he is bound by the terms of the agreement and cannot now plead ignorance or negligence in executing the same (see *Chai Then Song v Malayan United Finance Bhd* [1993] 2 CLJ 640). The fact that he might have been confused as to whether the agreement was for Elegant Win Sdn Bhd or for himself does not in any manner alter his obligations under the agreement. In *Saunders (executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society* [1970] 3 All ER 961, Lord Reid set out the law in relation to the plea of non est factum in part as follows:

> ... The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any enquiry as to their purpose or effect. But the essence of the plea of non est factum is that the person signing

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believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

**[30]** In the instant case there was no evidence before the Court on which the Court could conclude that Ujang had signed the share financing facility believing it to be a facility for Elegant Win Sdn Bhd.

**[31]** In any event there is a period of some three months between the execution of the share financing facility in October 1993 and the facility for Elegant Win in December 1993. Additionally the agreements were prepared by different sets of solicitors and Messrs Shahinuddin & Ranjit who prepared the Share Financing Agreement have attested to the presence of Ujang. Therefore the reasonable conclusion to be drawn is that Ujang did in fact sign two different sets of agreements at different times at different solicitors' offices in respect of two different facilities. This is borne out by some of his own correspondence where he recalls having attended at the offices of Shahinuddin & Ranjit. There can there be no real dispute that Ujang did sign the share financing facility and that he is bound by its terms.

*The drawdown notices*

**[32]** Like PW5, Ujang confirmed that the drawdown notices were signed in blank. In this respect his evidence was corroborated by that of DW2 Zainal Abidin bin Nasir who witnessed his signing the drawdown notices in blank. Ujang also confirmed that some of the notices had the name of Elegant Win Sdn Bhd on them while the others did not. It is evident from the foregoing that the drawdown notices with the 'Elegant Win Sdn Bhd' letterhead on them related to the facility for Elegant Win, while the others were utilised for the share financing facility.

**[33]** Ujang explained that he signed these documents in blank because he had been told by the officers at the Bank that it would facilitate the utilisation of the facility/facilities to sign the notices beforehand. He duly did so, believing that utilisation would be facilitated. This begs the question, did Ujang sign the drawdown notices for the share financing facility with a view to authorising PW5 to trade on his behalf using his facility? There is no direct evidence to support this proposition. It remains to be considered on an entirety of the evidence whether it may be inferred or implied that he did in fact confer such wide authority to PW5 and other officers of the plaintiff.

*Conduct of trades*

**[34]** Ujang denied categorically ever instructing either PW5 or any other

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officers of the plaintiff to buy and purchase shares on his behalf using his share financing facility with the plaintiff. He denied using the telephone or any other means to do so. Having perused PW5's evidence as a whole and having watched Ujang's demeanour in court, it appeared to this court that Ujang was indeed stating the truth when he maintained that he had not placed any orders for the purchase and sale of shares. I so conclude for the following reasons:

(i) Ujang was clear and categorical in his evidence that he had not placed any orders for the purchase and sale of shares;

(ii) the quantity of shares purchased were large;

(iii) Ujang had no account with any one or more of the broking firms through which the shares were purchased. The broking firms extended to a firm in Singapore. If indeed these trades had been conducted at Ujang's behest, then these trades would have been undertaken in an account in his name, more probably than not in one broking firm, and the shares purchased would have been in his name or held for his account. There is no such evidence before this court;

(iv) no accounts were produced by the plaintiff evidencing the purchase and sale of these shares over the periods of time stipulated in the drawdown notices;

(v) no contract notes were produced showing that Ujang had indeed placed orders for the purchase and sale of these large quantities of shares;

**[35]** It is therefore not apparent at whose request precisely these shares were purchased and sold.

*Receipt of trading profits*

**[36]** Ujang maintained that he did not receive the benefit of the proceeds of trades vide the cheques issued by the plaintiff in his favour. As outlined above, the quantum of these cheques was relatively large ranging from thirteen thousand ringgit to thirty-six thousand ringgit.

**[37]** Ujang maintained variously that:

(a) the cheques were received by one Ismail Ahmad and not himself;

(b) he had not received the proceeds of those cheques, despite the fact that they are 'crossed' cheques and the fact that they were encashed;

(c) in one of his affidavits Ujang maintains that Ismail Ahmad handed over the cheque for thirteen thousand ringgit to him, and asked that Ujang encash it and give Ismail eight thousand ringgit and retain five thousand

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for his own 'expenses'. Although the affidavit went no further, Ujang maintained in oral testimony that he did not encash the cheques;

(d) when asked categorically whether he had taken or benefited from any proceeds from the cheques, he denied that he had done so, and speculated that the cheque had been 'uncrossed' and utilised by other persons. He produced no evidence to substantiate this. Neither did he produce any bank accounts for the period to show that he had not encashed or received any part of those monies.

**[38]** The evidence from the plaintiff and Ujang was therefore in direct contradiction. On the one hand, as maintained by the plaintiff, the cheques for these trading profits had been made out in Ujang's name and were crossed cheques. The plaintiff was able to produce a copy of one of the cheques issued to Ujang in the sum of RM13,130.59. This cheque bore the words 'Account Payee Only' across the top left hand corner. This meant, in the normal course of affairs, that only Ujang could encash those cheques. Section 81A of the Bills of Exchange Act 1949 which states: 'Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque shall not be transferable, but shall only be valid as between the parties thereto'.

**[39]** On the other hand, there is evidence before the court that the cheques were received on behalf of Ujang by one Ismail Ahmad. There is a gap in the evidence as it is not known who or how it was encashed, save that it was in fact encashed. There is no clear evidence that Ujang received the cheques and went on to encash it.

**[40]** When queried by the court, Ujang maintained that he had not 'touched' the money because he knew that if he did, he would be 'caught' in the 'trap' and would be implicated with liability for the facility. From this it was evident that Ujang did in fact suspect or was even cognizant that his share financing facility was being utilised by officers of the plaintiff for the purchase and sale of shares, but that he did not want to get involved or to be personally liable for those trades.

**[41]** On a consideration of the competing contentions, it was concluded on the basis of the evidence before the court and the law in relation to 'crossed' cheques that the cheques were encashed by or with Ujang's knowledge. This is because Ujang produced no basis for his speculation that the cheques were, on receipt, 'uncrossed' and encashed by persons other than himself. There was no evidential basis on which the court could accept this contention.

Even if it is concluded that Ujang did have the benefit of the proceeds of sale, as the documentary evidence shows that the cheques were made out in his

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name and only he could have encashed those cheques, the issue that arises for consideration is:

(i) Whether Ujang by signing the agreement, pre-signing the drawdown notices and accepting trading profits issued vide cheques made out in his name, did authorise, expressly or implicitly the use of his share financing facility by officers of the plaintiff to buy and sell shares on his behalf?

**[42]** The other issue namely whether Ujang did in fact utilise the said share financing facility by placing orders for the purchase and sale of the shares resulting in the creation of the debt has been addressed above. I had concluded that Ujang did not directly utilise the share financing facility by placing orders for the purchase and sale of shares as suggested intitially by PW5 in his evidence for the reasons set out above. Therefore the remaining issue is as outlined above.

**[43]** Can it be concluded that because Ujang signed the requisite share financing facility agreement, the blank drawdown notices and possibly accepted trading profits arising from these trades, that he thereby authorised the use of his own facility by third parties for the conduct of those trades? If so it would follow that he is liable for the losses arising thereby.

**[44]** By signing the share financing facility agreement Ujang becomes bound by its terms. By signing the drawdown notices in blank, Ujang authorised the use of, inter alia, his share financing facility. But the question that arises is this:- For what purpose did he authorise the use of his share financing facility? Can it be concluded that because he signed those drawdown notices in blank that he was giving the plaintiff's officers the carte blanche to place orders for the purchase and sale of shares in the market and that he was prepared to undertake any losses arising therefrom? In this respect, I have concluded earlier that on a consideration of the totality of the evidence before the court, the plaintiff has not proved that Ujang did in fact give direct orders to the plaintiff's officers to execute the trades that they executed utilising his facility.

**[45]** Such an authorisation is wide and has far reaching consequences. In order to accord the plaintiff's employees such wide powers and authorisation it would be necessary for such authorisation to be express and precise. There has been no such express authorisation shown by the plaintiff in the course of its case. From a consideration of the entirety of the evidence in this case, it appears that Ujang while behaving less than prudently in pre-signing blank drawdown notices, cannot be said by so signing the notices, to have authorised PW5 or his officers to execute trades to the extent that they did, on his behalf, using his facility.

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**[46]** At this stage it is important to highlight the difference between this case and one where a client deals directly with a dealer or dealer's representative. In such cases, the oral instructions of the client by telephone or in person are corroborated by the issuance of contract notes and other statements immediately upon the trades being executed. Even in share financing cases where the financier remits the client's instructions to a licensed dealer's representative, there is a system in place whereby an account in the client's name is in place and contract notes are sent to both the financier and its client by the broking firm. In short the client is estopped from denying the trades by reason of his failure to respond to the contract notes and statements issued to him.

**[47]** In the instant case, PW5 gave evidence initially that Ujang directly instructed him on the phone to execute those trades. However he was unable to produce any evidence to substantiate this contention. While it is true that the stockbroking industry particularly in 1993 and 1994 was conducted on the basis of oral instructions not necessarily caught on tape, any trades conducted were usually followed up by the issuance and posting of contract notes confirming those trades, as outlined above. In the instant case, there are no such contract notes save for one in the name of Ujang in relation to Khong Guan shares. This in itself is insufficient to establish a course of conduct showing use of the facility or express authorisation for the use of the facility by Ujang.

**[48]** Neither were there any statements of account issued on a routine basis, produced at trial to evidence these trades. The only statements were those handed over by PW5 to Ismail Ahmad. There is therefore nothing to show that the Defendant personally received the statements showing the conduct of trades using financing from his account.

**[49]** Finally as outlined above, the purchase and sale of these shares were not conducted in accounts held in Ujang's name. While it might well be that these trades were conducted and held in a single Bank Rakyat account, there were no documents produced to show that these particular purchases were so held by way of trust for Ujang.

**[50]** The strongest piece of evidence in the plaintiff's armoury is the fact of the encashment of the four 'crossed' cheques made out in favour of Ujang. Can it be concluded from this evidence coupled with the signing of the financing facility agreement as well as the drawdown notices that Ujang had in fact authorised the entirety of the transactions and benefited from the trading such that he is liable for all losses accruing to his account?

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**[51]** From the picture that has emerged at trial, it is equally pertinent that there are several crucial lacunae in the plaintiff's case that raise queries or issues. If indeed Ujang was complicit in a plan to utilise the plaintiff's financing facility to purchase shares, then he had to do so with the approval and connivance of the plaintiff's officers and employees including Ruzaini. From the totality of the evidence for reasons cited above, Ujang himself did not place the orders for the purchase and sale of shares. The trades were conducted by Ruzaini but it is not clear at whose behest. Ruzaini could utilise inter alia Ujang's account because the drawdown notices had been pre-signed. It is therefore evident that the plaintiff's employees were complicit in utilising the share financing facility for the purchase and sale of shares. The plaintiff's officers or employees used Ujang's facility to trade in shares, with his reluctant or tacit consent. The full extent to which his account was being utilised was not made known to him. This connotes irregularity on the part of the plaintiff's officers and employees.

**[52]** In the light of such evidence can it be concluded that Ujang is to be held solely responsible for the utilisation of the facility afforded by the Bank to him, when it was in fact the plaintiff's officers who utilised the account for the purchase and sale of shares resulting in accrued losses exceeding RM1m?

**[53]** In order to so conclude, there should be sufficient evidence before the court to warrant the conclusion that there was express authorisation from Ujang allowing the utilisation of his account by officers or employees of the Bank, with his full comprehension that he would be liable for losses arising therefrom. However, there is insufficient evidence before the court to enable it to conclude that Ujang so understood and accepted such liability. While there is evidence to show that he entered into the share financing facility agreement, signed the drawdown notices in blank and received some proceeds arising from trading profits, on the facts of this case, it is insufficient to conclude that he therefore undertook the entire liability for the purchase and sale of shares undertaken by the plaintiff's employees. If the evidence had revealed that Ujang had indeed placed orders for the trades himself and received contract notes and documentation evidencing such trades then it would have been possible to conclude that he had utilised the facility or had expressly authorised the same, with the net result that he would be estopped from denying liability for those trades and thereby the facility. It is the singular absence of any concrete evidence to show that he participated or acquiesced fully to the trades that were undertaken by the plaintiff's employees that throws doubt on his liability for the losses incurred thereby.

**[54]** In this context the encashment of the cheques does not of itself warrant the conclusion that he was cognizant of the trades because it was in

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fact the plaintiff's officers and employees who had full conduct of the share financing facility through use of the pre-signed drawdown notices.

**[55]** For the foregoing reasons, I am unable to conclude that the plaintiff has proved its case on a balance of probabilities. While Ujang has not proved his case in fraud either, the entirety of the evidence shows that there were serious irregularities in the conduct of the share financing facility which in turn throws doubt on whether Ujang was in fact liable for the trades executed utilising his account. Accordingly the court is left with no option but to dismiss the plaintiff's case.

*Plaintiff's case dismissed.*

Reported by Andrew Christopher Simon